

ACQUISITION AND  
TECHNOLOGY

## OFFICE OF THE UNDER SECRETARY OF DEFENSE

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7 NOV 1998

MEMORANDUM FOR SBIR PROGRAM MANAGERS FOR THE MILITARY DEPARTMENTS  
AND DEFENSE AGENCIES

FROM: Jon Baron, DoD SBIR Program Manager

SUBJECT: Phase III Follow-on SBIR Contracts

This memorandum serves to clarify DoD policy regarding the award of a contract to a small business for follow-on work to an SBIR project. In general:

- DoD organizations that wish to award a contract to a small business for follow-on work (R&D or production) to an SBIR project may do so *without further competition*, provided that the follow-on work meets the statutory criteria for "phase III" of SBIR. In such cases, justification and approval are not required for other than full and open competition.
- If the follow-on work does *not* meet the statutory criteria for phase III, either full and open competition or justification and approval for other than full and open competition are required prior to awarding a contract.
- This memo discusses two guidelines that DoD organizations should follow in implementing this policy.

Further competition not required if follow-on work meets statutory criteria for  
"phase III" of SBIR

The 1992 Small Business Research and Development Enhancement Act (P.L. 102-564) made it clear that if a federal agency wishes to fund follow-on work to an SBIR project in "phase III" of SBIR, that agency need not conduct another competition in order to satisfy the Competition in Contracting Act (CICA). As explained in the Committee report on the legislation:

*"... an agency which wishes to fund an SBIR project in phase III (with non-SBIR monies) or enter into a follow-on procurement contract with an SBIR company, need not conduct another competition in order to satisfy the Federal Competition in Contracting Act (CICA). Rather, by phase III the project has survived two competitions and thus has already satisfied the requirements of CICA ...." [H. Rept. 102-554, part I, on H.R. 4400]*

OPTIONAL FORM 99 (7-80)

## FAX TRANSMITTAL

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GENERAL SERVICES ADMINISTRATION

The DoD General Counsel recently issued an opinion which confirms that further competition is not required for follow-on R&D or production as long as the follow-on work meets the statutory criteria for phase III:

*"It is our opinion that Phase III SBIR funding that meets the criteria of 15 U.S.C. Section 638(e)(4)(C) [the definition of phase III in the Small Business Act] may be awarded without further competition. Where, however, the follow-on activity is for production that does not meet the criteria of section 638(e)(4)(C), other authority, such as 10 U.S.C. 2304(c)(1), may be required to continue exclusively with the SBIR contractor . . ."* [DoD General Counsel, 17 November 1995]

By extension, if proposed follow-on work does *not* meet the statutory criteria for phase III, either full and open competition or justification and approval for other than full and open competition are required prior to awarding a contract.

#### **Guidelines that DoD organizations should follow in implementing this policy**

Before a DoD organization awards a follow-on contract to an SBIR project without competition, the organization should follow two general guidelines.

- (I) The contracting officer should establish, through consultation with the prospective COTR for the proposed contract as well as the COTR on the SBIR project (if available), whether the proposed follow-on R&D or production work meets the statutory criteria for phase III, which are as follows:

*The proposed work is (i) an "application[ ] of SBIR-funded research or research and development" for "products or services intended for use by the Federal Government" or (ii) a "continuation of research or research and development that has been competitively selected [in phase I and phase II]."* [15 U.S.C. Section 638(e)(4)(C)]

As discussed above, if the proposed contract meets these statutory criteria for phase III, the contract may be awarded to the small business without further competition and without justification and approval for other than full and open competition.

- (II) The organization should determine whether five or more years have elapsed between the end of the SBIR project and the start of the proposed follow-on contract. If so, the contracting officer and prospective COTR on the proposed contract should consider that competition may well be in the government's interest even if the proposed work meets the statutory criteria for phase III.

In these cases, competition may well be in the government's interest because, after five years, the government has unlimited rights in the technical data developed during the SBIR project, and can therefore conduct a competition in which all proposing companies have access to those data. The result of the competition may be a more affordable, higher-quality product for the government than could be delivered on a noncompetitive basis by the SBIR contractor.